APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1967

No. 465

ELISHA EDWARDS,
PETITIONER

vs.

PACIFIC FRUIT EXPRESS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 7, 1967
CERTIORARI GRANTED OCTOBER 23, 1967

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INDEX

Appendix

District Court of the United States for the Southern Division of the Northern District of California

No. 44,413

Elisha Edwards, Plaintiff,

vs.

Pacific Fruit Express Company, a Utah Corporation, Defendant.

COMPLAINT FOR DAMAGES (FELA)

Plaintiff complains of defendant and for cause of action alleges:

I

That at all times herein referred to, the defendant PACIFIC FRUIT EXPRESS COMPANY was and still is a corporation incorporated under and existing pursuant to the laws of the State of Utah and was, and still is, a common carrier by Railroad within the meaning of Title 45 USC 51 engaged in interstate commerce between the several states.

II

That on or about the 9th day of November, 1963, the plaintiff herein was an employee of said PACIFIC FRUIT EXPRESS COMPANY engaged in work in furtherance of defendant's railroad operations in interstate commerce.

III

That on or about the 9th day of November, 1963, plaintiff was operating a certain motor vehicle on the premises of the defendant in the City of Roseville, County of Placer, California. That plaintiff was operating said motor vehicle at the direction of said defendant in the course and scope of his employment. That said motor vehicle was owned and maintained by said defendant and was furnished by said defendant for the use of the plaintiff in the course of plaintiff's employment with defendant. That said motor vehicle was so poorly and negligently maintained by said defendant that it was in an unsafe and dangerous condition at the time and place mentioned above. That as a proximate result of said poor and negligent maintenance, the said vehicle failed in its normal use and plaintiff was precipitated violently to the ground, covered with burning gasoline, causing the injuries and damage hereinafter described.

IV

That at all times herein mentioned, defendant failed to provide plaintiff with a safe place to work and

failed to provide plaintiff with safe appliances with which to work. That said failure to provide a safe place to work and safe appliances with which to work proximately caused the injuries described hereinafter.

V

That defendant was negligent in its care, operation and maintenance of its yards, facilities, tracks, vehicles, equipment, appliances and properties at its location in said City of Roseville. That defendant failed adequately to oversee, manage, control and supervise the job which plaintiff was assigned and engaged in doing. That defendant failed to furnish sufficient, adequate and proper equipment for the performance of the job to which plaintiff was assigned. These acts and omissions all proximately contributed to the injuries which plaintiff was caused to suffer.

VI

As a proximate result of the acts and omissions complained of hereinbefore, the plaintiff was hurt and injured in his health, strength and activity, sustaining injury to his body and shock and injury to his nervous system and person, all of which said injuries have caused and continued to cause plaintiff great mental, physical and nervous pain and suffering. Plaintiff also is informed and believes that said injuries will result in permanent disability and disfigurement as well as pain and suffering in the future, all to his damage in the sum of ONE MILLION DOLLARS ($1,000,000.00).

VII

That by reason of said injuries, sustained as aforesaid, it was necessary for plaintiff to engage the services of physicians, surgeons and hospitals; that plaintiff does not now know the reasonable value of said services to be obtained or to be reasonably required in the future.

VIII

As a further proximate result of said negligence of the defendant, plaintiff was prevented from attending to his usual occupation, and plaintiff is informed and believes that he will thereby be prevented from attending to said usual occupation for an indefinite period in the future.

WHEREFORE, plaintiff prays judgment for special damages according to proof and for general damages in the sum of ONE MILLION DOLLARS ($1,000,000.00) and for the cost of this suit and such other relief as the court shall deem proper.

Jack H. Werchick
Attorney for Plaintiff.

[Title of Court and Cause]

ANSWER TO COMPLAINT

Comes now defendant Pacific Fruit Express Company, a corporation, and in answer to the complaint herein, admits, denies, alleges, and avers as follows:

I.

Answering paragraph I of plaintiff's Complaint, defendant Pacific Fruit Express Company admits

that at all times herein referred to, the defendant Pacific Fruit Express Company was and still is a corporation incorporated under and existing pursuant to the laws of the State of Utah.

II.

Answering paragraph II of plaintiff's complaint, defendant admits that on or about the 9th day of November, 1963, the plaintiff herein was an employee of said Pacific Fruit Express Company.

III.

Answering paragraph VII of plaintiff's Complaint, defendant admits the allegations therein contained.

IV.

Denies generally and specifically each and every allegation contained in plaintiff's Complaint not expressly admitted to be and, without limiting the foregoing, this defendant denies that it was guilty of any negligence, either as alleged in plaintiff's Complaint, or otherwise, or at all, and further, without limiting the foregoing, denies plaintiff was damaged in the sum alleged in the Complaint, or in any other amount, or at all.

For A Second, Separate, and Distinct Answer and Affirmative Defense, This Defendant Alleges That:

The plaintiff Elisha Edwards did not exercise ordinary care, caution or prudence in the premises to avoid said accident and for his own safety and the

accident and resultant injuries, if any, sustained by said plaintiff, were proximately contributed to and caused by the failure of said plaintiff to exercise ordinary care, caution or prudence in the premises to avoid said accident and for his own safety in the premises.

For A Third, Separate, and Distinct Answer and Affirmative Defense, This Defendant Alleges That:

The Complaint fails to state a claim against defendant upon which relief can be granted.

For A Fourth, Separate, and Distinct Answer and Affirmative Defense, This Defendant Alleges That:

The Court lacks jurisdiction over the subject matter of the action.

For A Fifth, Separate, and Distinct Answer and Affirmative Defense, This Defendant Alleges That:

The right of action set forth in the Complaint did not accrue within one year before the commencement of this action.

For A Sixth, Separate, and Distinct Answer and Affirmative Defense, This Defendant Alleges That:

Defendant is an employer within the provisions of Sections 3201 et seq. of the Labor Code of the State of California, and plaintiff's sole and exclusive

remedy is under said provisions and before the Industrial Accident Commission of the State of California. Pursuant to said laws defendant has paid the sum of $6,436.10 in temporary disability benefits and has furnished medical care and hospitalization.

For A Seventh, Separate, and Distinct Answer and Affirmative Defense, This Defendant Alleges That:

There is pending in the Superior Court in and for the City and County of San Francisco bearing action No. 548977, filed November 6, 1964, another action for personal injuries based on the same events set forth in plaintiff's Complaint.

Wherefore, defendant Pacific Fruit Express Company prays judgment that plaintiff Elisha Edwards take nothing by his Complaint, but that defendant have judgment for its costs of suit against said plaintiff and for such other relief as may be by the Court deemed proper.

Dated: January 7, 1966.

Corrigan and Roy
/s/ Donald Roy
Attorney for Defendant
Pacific Fruit Express Company

[Title of Court and Cause]

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

Please Take Notice that on Monday, the 7th day of February, 1966, at 10:00 A.M., or as soon thereafter as counsel can be heard, in the courtroom of the Court hearing the Law and Motion calendar, at the United States District Court House, 450 Golden Gate Avenue, San Francisco, the defendant Pacific Fruit Express Company will move the Court as follows:

For an order dismissing the complaint and for entry of summary judgment in favor of defendant and against plaintiff as prayed in the answer on file.

This motion is based on this notice, the pleadings, records, and files herein; on the affidavit of W. G. Cranmer, attached hereto as Exhibit B, the statement of reasons and memorandum of points and authorities in support of this motion, and the proposed summary judgment filed herewith.

Dated: January 19, 1966.

Corrigan and Roy
/s/ Donald Roy
Attorney for Defendant
Pacific Fruit Express Company

[Title of Court and Cause]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I

PRELIMINARY STATEMENT

This motion for summary judgment by defendant Pacific Fruit Express Company hereafter called PFE, is taken on the ground that PFE is not a common carrier by railroad under the Federal Employers' Liability Act, 45 U.S.C. Sections 51 et seq. According to the allegations of paragraph II of the Complaint and the Affidavit of W. G. Cranmer, pages 4 and 5, at all times pertinent hereto plaintiff was employed by PFE as an iceman. Plaintiff's Complaint sounds under the Federal Employers' Liability Act.

II

PFE IS NOT A COMMON CARRIER

The courts have been unanimous in holding that refrigerator car companies are not common carriers by railroad under the Federal Employers' Liability Act, and three of these cases have so held as to Pacific Fruit Express Company.

A recent authority is *Aguirre v. Southern Pacific Company, et al.*, 232 ACA 777 (March 1965). That case dealt with precisely the same problem and the same defendant. Judge Sheehy of the Superior Court for the County of Sacramento granted a summary

judgment and the matter was appealed to the District Court of Appeal which affirmed. A hearing has not been granted in the California Supreme Court. The District Court of Appeal held that since PFE does not operate as a common carrier by rail its employees do not come under the Federal Employers' Liability Act. The court further held that ownership of PFE by Southern Pacific and Union Pacific does not make PFE employees the employees of the railroads. Further, the mere fact an employee of a refrigerator company works on or near railroad cars does not convert his employer to a railroad or a railroad to his employer. *Aguirre* is in point and a copy of the District Court of Appeal opinion is attached hereto as Exhibit "A."

In *Gaulden v. Southern Pacific Company,* 78 F. Supp. 651 (N.D. Calif. 1948), *aff'd* 174 F. 2d 1022 (9th Cir. 1949); Judge Goodman held adversely to the plaintiff who raised the same contentions as are made by plaintiff in the instant case. Gaulden was employed as an iceman in the icing yard and plant owned and operated by PFE at Bakersfield, California. He was injured while aiding in the moving of an empty car from a loading platform. The Court's opinion states:

> " . . . Pacific Fruit Express Company neither moves nor controls the movement of 'reefers' to and from or beyond its icing docks and plants. Such movements are handled by rail common carriers, principally Southern Pacific Company or Union Pacific Railroad Company. This was

true in the case of the cars being unloaded when plaintiff was injured. Pacific Fruit Express Company possesses no rail motive power, except one plant locomotive used for shop switching purposes. The only railroad tracks owned by Pacific Fruit Express Company are shop tracks and unloading tracks. The former are used only in the operation of its car shops. The latter are used only for deliveries of ice to Pacific Fruit Express Company for use in its icing service. The only movement of reefers by Pacific Fruit Express Company are at its own shops and plants, on and along these tracks. These movements are incidental to the repair and rebuilding of reefers in the Pacific Fruit Express Company shops and the servicing of reefers at the Pacific Fruit Express Company ice plants." (pp. 653-54)

In holding that PFE is not a common carrier by railroad hence not within the Federal Employers' Liability Act, the court said:

"Plaintiff contends that the Pacific Fruit Express Company is a common carrier by railroad and hence within the reach of the Federal Employers' Liability Act. The Court holds to the contrary. The act itself subjects freight common carriers by railroad, while engaging in commerce between any of the several states or territories, to liability in damages to any person suffering injury while employed by such carrier in such commerce. 45 U.S.C.A. §51. There does not seem to be any doubt at all that the business of renting refrigerator cars to railroads or shippers and providing protective service in the transportation of perishable commodities is not of itself that of

a common carrier by railroad. *Ellis v. Interstate Commerce Commissioner,* 237 U.S. 434, 35 S.Ct. 646, 59 L.Ed. 1036; *United States v. Fruit Growers Express Co.,* 279 U.S. 363, 49 S.Ct. 374, 73 L.Ed. 739; *Wells Fargo & Co. v. Taylor,* 254 U.S. 175, 41 S.Ct. 93, 65 L.Ed. 205; *United States ex rel. Chicago Refrigerator Company v. Interstate Commerce Com.,* 265 U.S. 292, 44 S.Ct. 558, 68 L.Ed. 1024; *Reynolds v. Addison Miller Co.,* 143 Wash. 271, 255 P. 110.

"The Federal Employers' Liability Act was amended in 1939. At that time, despite earlier decisions, some of which have been cited, no effort was made to include refrigerator companies within its terms. Congressional inactivity in that regard must be given its usual implication, i.e acquiescence in the judicial rulings. Federal legislation concerning the social security of employees employed in Interstate Commerce specially included employees of Refrigerator Companies within the meaning of the term carrier, thus indicating Congressional awareness of the actualities. Thus the terms of the statute, plus the judicial interpretations of its meaning and the obvious knowledge of the Congress over a long period of time as to such judicial pronouncements, make it abundantly clear that Pacific Fruit Express Company itself is not a common carrier by rail and not subject to the provisions of the Act." (pp. 654-55)

The Supreme Court of Utah has also held that PFE is not a common carrier by railroad. In *Moleton v. Union Pac. R. R.,* 219 P.2d 1080 (Utah 1950), *cert.*

denied, 340 U. S. 932, a judgment of non-suit dismissing plaintiff's action under the Federal Employers' Liability Act was affirmed. Plaintiff was an ice man employed to descend into bunkers on refrigerator cars to regulate heaters which generate carbon monoxide gas. He was injured while performing this duty in the Union Pacific yards at Laramie, Wyoming. As in *Gaulden, supra,* the court held that the supply of refrigerator cars and protective services to railroads by PFE was not enough to make it a common carrier by railroad.

An unbroken line of United States Supreme Court decisions has conclusively settled that refrigerator car companies or companies supplying protective services to railroads, whether railroad owned or not, are not common carriers by railroad for any purpose, whether under the Federal Employers' Liability Act or under the Interstate Commerce Act. Thus, in *Ellis v. Interstate Commerce Comm'n,* 237 U. S. 434 (1914), it was held that Armour Car Lines, which owned refrigerator cars and rented them to railroads, and operated icing stations on lines of various railroads, was not a common carrier. At pages 443-44, the court said:

> "It has no control over motive power or over the movement of the cars that it furnishes as above; and in short, notwithstanding some argument to the contrary, is not a common carrier subject to the act. It is true that the definition of transportation is §1 of the act includes such instrumentalities as the Armour Car Lines lets

to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth. The control of the Commission over private cars, &c., is to be effected by its control over the railroads that are subject to the act."

Wells Fargo & Co. v. Taylor, 254 U. S. 175 (1920), held that an employee of a common carrier by express who was injured in the derailment of an express car in which he was working, which was part of a railroad passenger train, was not entitled to recover under the Federal Employers' Liability Act. It was held that the express company was not a common carrier by railroad. The remarks of the court on page 187 are particularly significant:

"In our opinion the words 'common carrier by railroad,' as used in the act, mean one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptation of the words, but is enforced by the mention of cars, engines, track, roadbed and other property pertaining to a going railroad (see *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 212-213); by the obvious reference in the latter part of ##3 and 4 to statutes requiring engines and cars to be equipped with automatic couplers, standard drawbars and other appliances intended to promote the safety of railroad employees (see *San Antonio & Aransas Pass Ry. Co. v. Wagner,* 241 U. S. 476,

484); by the use of similar words in closely related acts which apply only to carriers operating railroads, c. 196, 27 Stat. 531; c. 225, 35 Stat. 476; c. 208, 36 Stat. 350, and by the fact that similar words in the original Interstate Commerce Act had been construed as including carriers operating railroads but not express companies doing business as here shown. 1 I.C.C. 349; *United States v. Morsman,* 42 Fed. Rep. 448; *Southern Indiana Express Co. v. United States Express Co.,* 88 Fed. Rep. 659, 662; s.c. 92 Fed. Rep. 1022. And see *American Express Co. v. United States,* 212 U. S. 522, 531, 534.

"As Taylor was not an employee of the railroad company and the express company was not within the Employers' Liability Act, it follows that the act has no bearing on the liability of either company or on the validity of the messenger's agreement."

Fruit Growers Express Company, which is owned by a number of railroads, is engaged in the same type of business as PFE, the renting of refrigerator cars to railroads and the performing of protective services to perishable freight. *United States v. The Fruit Growers Express Co.,* 279 U. S. 363 (1929), held that Fruit Growers Express was not a common carrier by railroad under the Interstate Commerce Act.

The most recent holding in this field reaffirms that result as to Fruit Growers Express Co. and reaffirms the holding of this court in *Gaulden v. Southern Pac. Co.,* op cit. In *Hetman v. Fruit Growers Express Co.,* 346 F.2d 947, the Court of Appeals for the Third

Circuit considered the contention that the defendant was a common carrier by railroad within the meaning of the Federal Employers' Liability Act. The Court rejected the contention in the following language:

> (1) We are of the opinion that the District Court correctly held that the defendant is not a "common carrier by railroad" within the meaning of the Act.
>
> We need go no further than to cite *Gaulden v. Southern Pac. Co.*, 78 F.Supp. 651 (N. D. Cal. 1948), aff'd per cur. 174 F.2d 1022 (9 Cir. 1949), where it was held that the Pacific Fruit Express Company, which conducted a business similar in all critical aspects to that of the defendant, here, and which was also wholly owned by railroads, was not a "common carrier by railroad" within the meaning of the Act. It would serve no useful purpose to here restate what was so well said in Gaulden in its analysis and application of the Act or to make repetitious reference to the cases therein cited in support of the court's holding.

III

ICING OF RAILROAD CARS DOES NOT CONSTITUTE EMPLOYMENT BY A COMMON CARRIER

It is clear that plaintiff was employed by PFE which is not a common carrier by railroad. Moreover, it is settled that service on or around railroad equipment, including icing of refrigerator cars, does not constitute employment by a common carrier by railroad. It is not the equipment which plaintiff is servicing or working about that is critical; for a railroad relationship to exist a railroad must have the power to control and direct plaintiff's services. *Aguirre v. Southern Pacific Company, supra; Gaulden v. Southern Pacific Co., supra; Moleton v. Union Pac. R. R., supra; Wells Fargo and Co. v. Taylor, supra.* The plaintiff here was subject to the direction and control of the PFE. Under these circumstances plaintiff was working exclusively for PFE, an independent contractor, and not in any sense for the railroads.

Dated: January 20, 1966.

Corrigan and Roy
/s/ Donald Roy
Attorney for Defendant
Pacific Fruit Express Co.

[The opinion of the California District Court of Appeal in *Aguirre v. Southern Pacific Co.*, 232 Cal. App. 2d 636, 43 Cal. Rptr. 73 (1964), is omitted.]

State of California
City and County of San Francisco—ss.

Affidavit of W. G. Cranmer

W. G. Cranmer, being first duly sworn, deposes and says:

I am Assistant to the Vice President and General Manager of Pacific Fruit Express Company. Pacific Fruit Express Company (hereinafter referred to as "PFE") was incorporated in Utah in 1906. Its stockholders at that time, and now, are Union Pacific Railroad Company and Southern Pacific Company, each of which owns 120,000 shares of its common stock. PFE owns and maintains a fleet of refrigerator cars and refrigerated trailers specially designed to hold perishable commodities, such as fruits and vegetables, and rents them to practically all railroads in the United States, Canada and Mexico. PFE also furnishes protective services against heat or cold to commodities carried in said cars or trailers, by the use of ice or mechanical refrigeration for cooling, or portable alcohol heaters, for mechanical means for heating. PFE, as of December 31, 1965, owned and leased 20,852 refrigerator cars and 2039 trailers. It has approximately 3,700 employees. PFE has formal written contracts to render protective services to a number of railroads, including Western Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Chicago, Rock Island and Pacific Railroad; Chicago, Burlington & Quincy Railroad Company; Norfolk & Western Railway Company, Chicago

Great Western Railway; Illinois Central Railroad; St. Louis-San Francisco Railway Company; Southern Pacific Company, and Union Pacific Railroad Company. By virtue of other contractual arrangements, PFE supplies refrigerator cars to any railroad in the United States desiring to use them, and any railroad using a refrigerator car currently pays PFE a rental varying from 4.5 to 5.25 cents per mile for each mile the railroad may move the PFE car.

PFE does not directly or indirectly serve the shipping public as a common carrier by railroad. It is a supplier of services and vehicles to railroads, and does not hold itself out to render transportation service as a common carrier by railroad. PFE also has contracts with approximately fifty railroads covering the leasing of trailers. It is currently negotiating similar contracts with the other railroads in the United States, Canada and Mexico.

None of the properties or facilities acquired by PFE subsequent to its organization in 1906 were turned over to it or acquired from Southern Pacific Company or Union Pacific Railroad, but were acquired or constructed by PFE with its own funds. Prior to the organization of PFE in 1906, Southern Pacific Company and Union Pacific Railroad Company did not furnish refrigeration services directly, but contracted for these services with private concerns.

PFE does not issue bills of lading nor does it publish tariffs as a common carrier by railroad. Tariffs containing rates for the movements of perish-

ables are published by railroads, and PFE is not a party to such tariffs. PFE does not report to the California Public Utilities Commission, nor to any other state utilities commission. PFE files financial data with the Interstate Commerce Commission, and the Commission's authority is limited to the receipt of such data and the prescribing of the form of accounts. The Interstate Commerce Commission does not exercise any jurisdiction over PFE as a carrier.

PFE operates its business entirely with its own personnel and none of its employees are joint employees with either Southern Pacific Company or Union Pacific Railroad Company, or both. None of the directors of PFE are directors of Southern Pacific Company or Union Pacific Railroad Company. PFE operations are supervised by Mr. L. D. Schley, its Vice President and General Manager, whose office is at 116 New Montgomery Street, San Francisco, California. Neither Southern Pacific nor Union Pacific owns or has any interest in this building, and their San Francisco offices are at different addresses. PFE has its own car service, traffic, mechanical and engineering, purchasing and stores, and accounting departments which are completely separate from and independent of Southern Pacific and Union Pacific. The Vice President and General Manager of PFE reports to the President of PFE and to its Board of Directors. PFE has its own bank accounts in San Francisco; New York City, and Montreal, Canada. Its principal bank account is in the Crocker-Citizens National Bank, and its average balance is in excess

of a million dollars. All PFE expenses are paid from said bank accounts and its income from car rentals and protective service activities is deposited in said accounts. The Board of Directors of PFE holds regular meetings in New York City. PFE's net income for 1964 was approximately $5,000,000.00. As of the end of November 1964 the net assets of PFE were approximately $120,000,000.00. (1965 figures are not yet available.)

PFE's main general shops and the ice plant where Elisha Edwards worked are located at Roseville, California, on property owned and leased by PFE. The shops occupy an area about one and one-half square miles and the ice plant occupies an additional area about two hundred feet wide by one and one-eighth miles in length. The accident alleged to have occurred to plaintiff herein occurred on the ice plant premises, on a roadway running between icing docks. All of PFE's work and services at Roseville are supervised and controlled by its own officers and employees, and none of such work and services are subject to the supervision and control of any officer or employee of Southern Pacific Company or Union Pacific Railroad Company.

PFE has no rail motive power, except two shop switch engines used exclusively for shop switching purposes entirely within its own facilities at Roseville, California and Tucson, Arizona. The only railroad tracks owned by PFE are shop tracks and loading tracks. The former are used only in the operation of its car shops. The latter are used only for deliver-

ies of ice to PFE, which ice is made by PFE and used to furnish protective service. The only movement of cars by PFE is at its own shops. These movements are incidental to the repair of cars in PFE shops and to the furnishing of protective services. When PFE cars need repairs at Roseville, they are switched to the PFE repair tracks by a Southern Pacific locomotive and PFE pays Southern Pacific for this service. A similar payment is made to Union Pacific in Union Pacific territory.

Pacific Fruit Express Company officers negotiate and execute agreements with labor organizations representing PFE employees.

On November 9, 1963, Elisha Edwards was employed by PFE as an iceman. An iceman's duties are comprised chiefly of moving ice from one location to another, operating conveyors, and chains, installing and removing portable heaters, loading and unloading ice in bodies of cars, refueling mechanical cars, and other miscellaneous protective service work. All of Mr. Edwards' supervision was from PFE personnel. On the date of November 9, 1963, and for some time prior thereto, Mr. Edwards was employed only by PFE and not the Southern Pacific Company or the Union Pacific Railroad Company. Iceman's duties are done solely by PFE employees and there are no employees of Southern Pacific Company or Union Pacific Railroad Company engaged in performing such services for PFE at Roseville.

The PFE has been subject to the Workmen's Compensation Laws of the State of California since their

enactment. Pursuant to those laws, the plaintiff has been paid by PFE $6,436.10 in Temporary Compensation and has been furnished medical care and hospitalization.

Dated: this 20th day of January, 1966.

/s/ W. G. Cranmer

[Title of Court and Cause]

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant relies most heavily upon *Wells Fargo v. Taylor,* 254 U.S. 175 (1920). Plaintiff Taylor was an employee of Wells Fargo Company and was assigned to ride the express car while the car was being towed by a railroad company. The Court narrowly construed the F.E.L.A. such that the statutory language "common carrier by railroad" was held to mean "one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier." The unfriendliness of the Court to the Act is revealed by the balance of the opinion. Mr. Justice Van Devanter, speaking for the Court, held that it would be "inequitable" were the employee to recover for negligently inflicted injuries (there was no question of workmen's compensation here) against the railroad or the express company, since Taylor had been required to sign a contract in

which he "assumed the risk" of his employment and agreed to hold both his employer and the railroad harmless from liability for their own negligence. The Court felt that it would deprive the employee of his freedom of contract to allow him to maintain a common law action for negligence and it held that he was not under the protection of the non-assumption of risk clause of the Act.

The Federal Employer Liability Act, 45 U.S.C. 51, was enacted in 1908, 35 Stat. 65, after a prior act had been declared unconstitutional (Act of 1906, 34 Stat. 232.). The subsequent act was H.R. 20310, 60th Congress and was reported out of the House Judiciary Committee in H.R. Report 1386 (a copy of which is appended). On page six of that report, the committee discusses the purpose of section 5 of the Act. "Section 5 renders void any contract or rule whereby a common carrier seeks to exempt itself from liability created by this act." Later in the discussion at the bottom of page 6 a hypothetical example of the provision that the section seeks to void is set out. *American Express Company* is chosen as the subject of the example and it is *perfectly clear* that Congress intended such companies to be covered under the Act. In the *Wells Fargo* case the Court was dealing with exactly the same type of company and yet the Court failed to consider the clear legislative intent expressed in H.R. Report 1386 (60th Congress). Perhaps the Court did not have the text of the report before it when it made the decision, but in view of the history of that period it is more likely

that the Court was disregarding the legislative purpose. The Act was amended in 1910 to insure a more liberal interpretation of the death section and to clarify jurisdictional questions (See H.R. Report 513 [61st Congress] appended hereto.). The Act was again amended in 1939 (53 Stat. 1404) to overrule the restrictive effect of decisions which had held that employees of admitted common carriers could not recover under the Act unless they themselves were engaged in interstate commerce at the time of the death or injury. (The amendment overruled *Shanks v. D.L. & W. R.R.*, 239 U.S. 556) (See Senate Report 661, 76th Congress appended hereto). The 1939 enactment was not an overall revision of the statute as can be seen from the limited objectives set out on page 2 of Senate Report 661.

Gaulden v. Southern Pacific, 78 F. Supp. 651, and *Aguirre v. Southern Pacific*, 232 Cal App 2d 636, relied upon by defendants follow *Wells Fargo*, supra, and depend entirely upon it for their vitality. *Aguirre* simply follows *Gaulden* and since the latter is merely an intermediate appellate court decision of the state courts in California, it does not require separate discussion. The *Wells Fargo* case is plainly and markedly out of the spirit of the modern commerce clause cases and the courts in both *Gaulden* and *Aguirre* demonstrated a marked reluctance to follow it. Plaintiff's major contention is that the Supreme Court has, *sub silento*, overruled the whole line of cases upon which defendant relies, including *Wells Fargo v. Taylor*, supra.

In 1937 in the case of *Jones and Laughlin Steel Co. v. N.L.R.B.*, 301 U.S. 1, 81 L. Ed. 893, the Supreme Court overruled the entire restrictive line of commerce clause cases that typified the late Ninteenth and early Twentieth century. That ruling was extended to include the working conditions of employees engaged in interstate commerce in *United States v. Darby,* 312 U.S. 100, 85 L.Ed. 609, the case in which the Wages and Hours Act was upheld. In the famous case of *Wickard v. Filburn, 317 U.S. 111, 87 L.Ed.* 122, the Court extended the effect of the commerce clause to include any activity which directly or indirectly affected interstate commerce. The 1965 cases of *Heart of Atlanta Motel v. Katzenbach,* 379 U.S. 241, and *Katzenbach v. McClung,* 379 U.S. 294, illustrate the extreme liberality with which the commerce clause is applied at present. These cases plainly indicate that the rule of liberal construction has become firmly established for statutes based upon the Commerce Clause. It seems equally clear from the legislative history discussed earlier, that F.E.L.A. was intended to be applied liberally and in particular to express company employees (See H.R. Report 1386, 60th Congress, appended hereto). The phrase "common carrier by railroad" was intended to include all activities closely connected with the actual carriage of goods by railroad in interstate commerce. The terminal company cases, which will be discussed below followed a liberal interpretation of the Act from the beginning.

The plaintiff here contends that this court is not confined by the *Wells Fargo* case. The whole narrow restrictive policy on which Wells Fargo was based has been rejected in *Jones and Laughlin Steel Co. v. N.L.R.B., supra* and the long line of cases following that historic decision. The rejection of the old policy has implicitly overruled the *Wells Fargo* case itself. It is to be noted that none of the Supreme Court authority cited by defendant is more recent than 1929 and the *Wells Fargo case itself is a 1920 decision.*

Moreover, it is to be noted that employees of the express companies have been included in other statutes dealing with common carriers by railroad enacted since F.E.L.A:

The Railway Labor Act, 45 U.S.C. 151 (1926), The Railroad Retirement Act, 45 U.S.C. 228(a) (1935), the Railroad Retirement Tax Act, 26 U.S.C. 1532, the Carriers Taxing Act, 45 U.S.C. 261 (1935—since repealed), and The Railroad Unemployment Insurance Act, 45 U.S.C. 351 (1938). The inclusion of refrigerator car companies under all these statutes was accomplished by including in the statutes a description of the activities that constituted those of a common carrier by railroad, "icing" cars being specifically included. Throughout these statutes is present the clear Congressional intent to treat all activities closely related to common carriage by railroad as subject to the various acts regulating common carriers by railroad. PFE has been subject to all the named acts because its activities fall within those listed as

activities of a common carrier by railroad as noted in *Gaulden,* cited by defendants.

Defendant can find no support in *Ellis v. Interstate Commerce Commission,* 237 U.S. 434 (1914) since that decision does *not* involve the question of whether or not Armour was a common carrier by railroad. It was held that Armour was involved in interstate commerce but that the Commission could not presume to treat Armour as a common carrier without first establishing that it was such. The case involved a refusal by a witness to answer questions propounded by the Interstate Commerce Commission. Mr. Justice Holmes states, *obiter,* that Armour was not a common carrier, but no one, including the Commission, had said that it was. The nature of Armour's business does not appear in the case, nor is it of any moment in the decision. The case simply held that some of the questions propounded had to be answered and some did not, and that Armour was subject at least to some of the investigative power of the I.C.C.

United States v. Fruit Growers Express Co., 279 U.S. 363 (1929), is not determinative of the status of PFE as a common carrier by railroad. That case was a criminal action in which the defendant was prosecuted for making a false entry in a common carrier's report under the Interstate Commerce Act. It was found that the express company was not a common carrier. It is to be noted that the nature of Fruit Growers Express was considerably different than PFE. The so-called protective services is all that

Fruit Growers provided. In fact, the case indicates that icing cars was their entire business. They did not own cars or tracks as does PFE. The sole question before the Court in the *Fruit Growers Express* case was whether icing cars *without more* made the company a common carrier by railroad. PFE's other activities and extensive ownership of railroad equipment plainly distinguish the *Fruit Growers Express Company* opinion.

The Supreme Court has not spoken on the subject of express companies and F.E.L.A. since the *Wells Fargo* decision. But it has rendered another line of decisions, the terminal company cases, which plaintiff urges upon the court as stating the controlling law. Actually the facts of the instant case come closer to that line of authority than the so-called "express company" cases relied upon by the defendant. In *Fort Street Union Depot Company v. Hillen,* 119 F.2d 307 (1941) the court, dealing with a terminal company engaged chiefly in making up trains for interstate commerce and providing services for the trains that used the terminal, held that a terminal company is subject to the Federal Employer's Liability Act. Relying on *United States v. Brooklyn Eastern District Terminal,* 249 U.S. 296, and *Union Stockyard v. United States,* 308 U.S. 213, the Court said: It is no longer open to dispute that a terminal company engaged in furnishing facilities and services is a common carrier where the character of the service in its relation to the public demonstrates its nature as a common calling." In the *Union Stockyard* case,

supra, the terminal company was engaged in loading and unloading cars and providing various other services but did not own any cars or tracks. The railroads paid a fee to the terminal company for its services, and the tariffs of the railroads included these services without a separate charge being made for them. *No direct services were rendered to the public.* The United States Supreme Court held that the terminal company was a common carrier within the meaning of the Interstate Commerce Act, 49 U.S.C. 1-27. The similarity of this arrangement with that existing between various railroads and the defendant, Pacific Fruit Express, is clear; neither provides a direct transportation service to the public.

PFE indicates that it does not load and unload cars, but it does work very closely with the railroads in that connection. In *Union Stockyard* the company did not own railroad cars or tracks, but it provided services exclusively. PFE by its affidavit admits ownership of some twenty thousand refrigerator cars. (Defendant's Exhibit "B" 1:19-20.) In addition the *Union Stockyard* case clearly holds that it is not necessary that the service be provided directly to the public to make the company a common carrier by railroad. Nor does the ownership of motive power seem to be of particular significance, although PFE does admit to owning and operating switch engines. (Defendant's Exhibit "B" 4:4-7) Another of the terminal company cases was *United States v. Brooklyn Eastern District Terminal Co., supra,* 249 U.S. 296. The Brooklyn Eastern District Terminal Co.

provided a switching service to railroads in and out of its ocean terminal facility. It owned no cars, rendered no services to the public directly and owned only a small amount of track in and around the terminal facility. It was held subject to the Hours of Service Act as a common carrier by railroad engaged in interstate commerce in that case. (Followed in *Busch v. Brooklyn Eastern District Terminal*, 218 N.Y.S. 516, 218 App. Div. 782.)

McCabe v. Boston Terminal Company, 303 Mass. 450, 22 N.E. 2d 33, was also a terminal company case. The company owned no engines or cars. It owned tracks, the station and yard facilities. It directed switching and making up of trains, controlled traffic in the yards and did some loading and unloading. The plaintiff was injured unloading mail. The company was held to be a common carrier by railroad and the employee entitled to sue under the F.E.L.A. It appears from a comparison of defendant's affidavit (Exhibit "B") with these terminal company cases that PFE bears more resemblance to a terminal company than it does to an express company. A discussion of defendant's cases will tend to bear out this fact.

As previously noted it is not necessary to deal in detail with *Aguirre v. Southern Pacific*, 232 Cal App 636, because it merely relies on *Gaulden v. Southern Pacific*, 78 Fed. Supp 651. It is plaintiff's contention that *Gaulden* is in error though it is apparent the court had no basis for deciding otherwise because no authority was cited to the court which would have

led it to any other conclusion. The cases cited in support of plaintiff's position here were not brought to the attention of the court in either *Gaulden* or *Aguirre*.

Judge Goodman in *Gaulden* mentioned that the F.E.L.A. statute had been amended in 1939 without adding employees of express companies or refrigerator companies to the list of covered employees. It was inferred from that fact by the court that if Congress wished to cover these employees it would have added such groups when the statute was amended. As noted previously, the 1939 amendment was not a revision of F.E.L.A. and was confined to limited objectives set out in Senate Report 661, 76th Congress (appended hereto). A consideration of that report shows that the inference is not justified. It is more reasonable to conclude that the inclusion of companies such as Pacific Fruit Express under all the other statutes cited previously meant that Congress intended to include all railroad employees in a uniform statutory scheme. Considering the existence of the terminal company cases, it would easily have appeared to Congress that employees of companies such as PFE were already covered under FELA, especially in view of the doubtful vitality of the pre-1937 commerce clause cases.

It was previously mentioned that the basis of the *Wells Fargo* case was the holding that Wells Fargo was not a common carrier by railroad because it was not a railroad company. In *Fleming v. Railway Express Agency,* 161 F.2d 659, Railway Express *was* [illegible] carrier by railroad:

> "We are convinced that a common carrier is one who, for hire, engages in transporting commodities from one place to another, or in connection with another carrier, such as a railroad. It does not step outside its common carrier status because it only renders part, though a necessary part, of a transportation service, or because it renders its service as an agent of a common carrier."

Railway Express was held to be exempt from wartime price control legislation because *common carriers* were exempted. It is to be noted that Railway Express is now engaged in exactly the same business as Wells Fargo was in 1920. The *Wells Fargo* case is not cited in *Fleming,* but the implication is crystal clear that the *Wells Fargo* case is no longer the law, since the earlier decision had specifically held that Wells Fargo was *not* a common carrier by railroad. The language quoted above from *Fleming* is clearly inconsistent with Wells Fargo's holding that "common carrier by railroad" means "a railroad company acting as a common carrier."

To summarize the argument: The terminal company cases represent the more liberal line of cases applying F.E.L.A. to entities where the character as a railroad is subject to question. The *Boston Eastern District Terminal Co.* case is the earliest, 1919. This case was picked up and followed in the *Union Stockyard* case in 1939 after the great revolution in the attitude of the Court toward the commerce clause and legislation enacted pursuant to it, ushered in by the *Jones and Laughlin* case in 1937. Defendant has cited us *no*

Supreme Court case following *Wells Fargo* since 1937. The business of PFE appears from PFE's own affidavit to be more similar to that of the terminal companies than that of the express companies. The authority of the *Wells Fargo* case is very doubtful since its reasoning has been completely rejected by later authority. The non-application of F.E.L.A. to companies such as PFE is anomalous in any event since all the other major sections of title 45 are applied to PFE and similar companies, specifically on the theory that such companies are common carrier by railroad. Nothing about the amendment of the act in 1939 refutes that contention. It is clear from the affidavit that PFE is engaged in railroad operations and its employees are subject to all the hazards that railroad employees are.

It is therefore respectfully requested that PFE be held to be a common carrier by railroad within the meaning of 45 U.S.C. 51 and that defendant's motion for summary judgment be denied.

Dated: March 10, 1966.

Respectfully submitted,
Jack H. Werchick
Attorney for Plaintiff

[The following Congressional Reports, found at R. 50-65 and alluded to in the Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment, are omitted:

H. R. Rep. 1386, 60th Cong. 1st Sess. (1908)
H. R. Rep. 513, 61st Cong. 2d Sess. (1910)
S. Rep. 661, 76th Cong. 1st Sess. (1939)]

[Title of Court and Cause]

DECLARATION OF JACK H. WERCHICK

I, Jack H. Werchick, declare under penalty of perjury:

That I am an attorney licensed to practice in the State of California and am attorney of record for the plaintiff herein.

That I directed Leland P. Jarnagin to investigate the nature of Pacific Fruit Express and that he obtained at my direction the materials submitted under his affidavit.

That I submit those materials as tending to prove that Pacific Fruit Express is more extensively involved in railroad operations than the affidavit of W. G. Cramner, submitted by the defendants herein, would tend to indicate. That a substantial question of fact exists as to the nature and extent of the railroad operations of Pacific Fruit Express.

I call particular attention to the numerous references to railroad activity in the document entitled "Pacific Fruit Express" and to the apparent identity of Pacific Fruit Express, Southern Pacific and Union Pacific indicated on the document entitled "NOW—PFE goes Piggyback!" calling particular attention to the photographs of Car 301213 and the text below that photograph.

Executed at San Francisco, California, this 10th day of March, 1966.

Jack H. Werchick

[Title of Court and Cause]

DECLARATION OF LELAND P. JARNAGIN

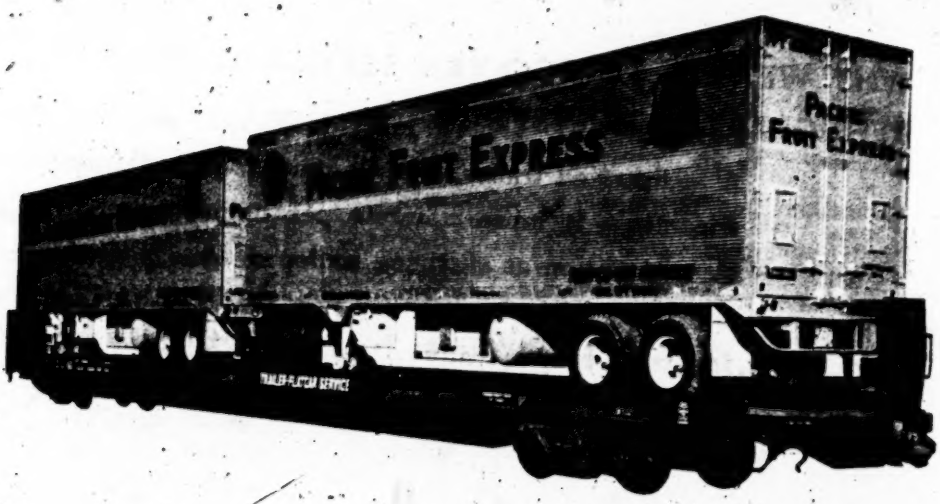
I, Leland P. Jarnagin, declare under penalty of perjury that if called as a witness I would testify, and the fact is that during the month of May, 1965, at the request of counsel for the plaintiff herein, I went to the office of Pacific Fruit Express at 116 New Montgomery Street in the City of San Francisco, California. I asked for material which described the activities of Pacific Fruit Express. I was handed the material attached hereto entitled "Pacific Fruit Express Company" and "NOW—PFE Goes Piggyback!" by personnel in the office of the company at that address. That the attached papers are the original papers handed to me by employees of Pacific Fruit Express Company at that time and place.

Executed at San Francisco, California this 10th day of March, 1966.

Leland P. Jarnagin

NOW—

PFE GOES PIGGYBACK!



Pacific Fruit Express presents **TEMPCO-VAN SERVICE**—and the 400 new refrigerated highway trailers/containers and 200 Piggyback rail flat cars just purchased to inaugurate it.

TEMPCO-VANS, the most modern trailers designed especially for combination highway and piggyback operation, are the latest addition to PFE's *first family of perishable transportation.*

WHAT WILL TEMPCO-VAN SERVICE DO FOR THE PERISHABLE TRADE?

Shippers and consignees want their shipments transported speedily and smoothly *and delivered to the market in top condition.*

TEMPCO-VAN service does this by combining the convenience of pick-up and delivery with the dependable railroad service of Southern Pacific and Union Pacific — PFE's owners.

WHY WE FEEL TEMPCO-VAN SERVICE IS FIRST IN REFRIGERATED TRANSPORT

A refrigerated trailer must do more than just transport and refrigerate — it must maintain perishable commodities in first-class condition at all times, under all conditions. Here is where the difference between PFE's new **TEMPCO-VANS** and other refrigerated trailers really counts. The **TEMPCO-VAN'S** air circulation and full perimeter cooling preserves freshness, quality and natural taste.

WILL ALL PERISHABLES, BOTH FRESH AND FROZEN, BE PROTECTED IN A TEMPCO-VAN?

Yes — because the temperature range is mechanically controlled from 10°F. below Zero to 80°F. above.

IS HEATER SERVICE AVAILABLE WITH TEMPCO-VANS?

Yes. **TEMPCO-VAN'S** unique mechanism also provides perfectly controlled heating and, by turning off the system, **TEMPCO-VANS** can be used as a non-refrigerated trailer for westbound dry freight shipments.

DOES TEMPCO-VAN PROVIDE AN ALL-PURPOSE TRAILER?

Yes. It gives unsurpassed PFE protective service against heat or cold. Sturdy construction and high-cube capacity provide a smooth ride for any load.

LOOK AT THESE TEMPCO-VAN VITAL STATISTICS:

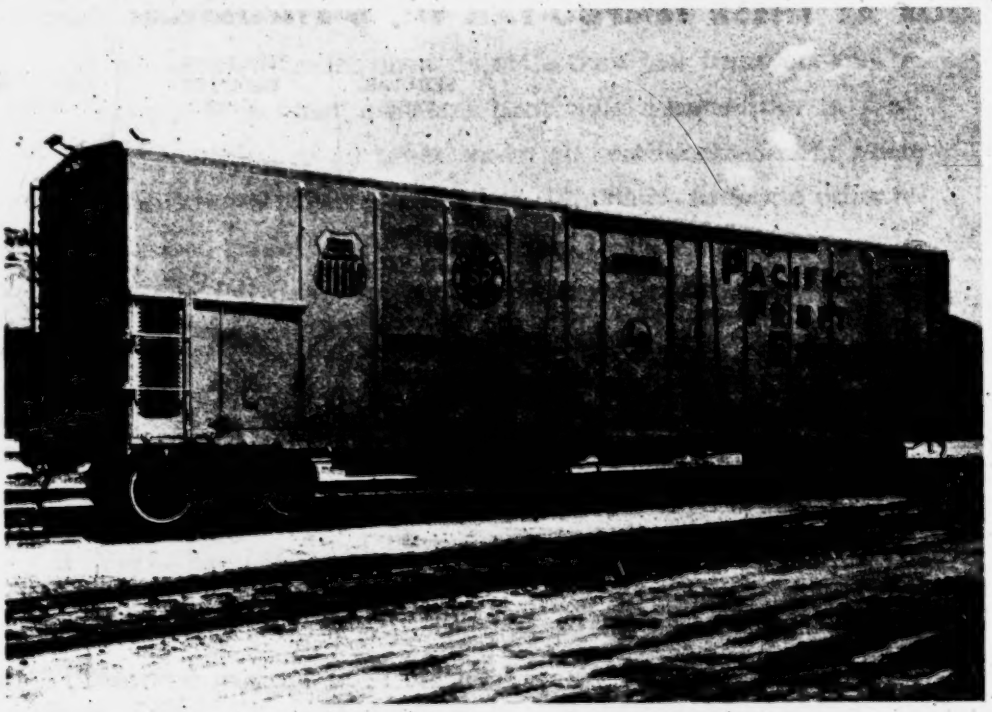
	REGULAR VANS	MEAT-RAIL EQUIPPED VANS	CONTAINER VANS
Number in service	180	200	20
Overall Width	8′ 0″	(same)	(same)
" Height	13′ 6″	"	"
" Length	40′ 0″	"	"
Inside Width	7′ 4″	7′ 4″	7′ 4″
" Height	8′ 1½″	7′ 9½″	8′ 1½″
" Length	37′ 9″	38′ 1″	38′ 4″
Total Cube	2249	2176	2264
Controlled Temperature Range	−10°F. to 80°F.	(same)	(same)

TEMPCO-VAN SERVICE IS IN PFE TRADITION

With over fifty years of Pacific Fruit Express service, PFE has come to mean "Perishables Finest Equipment." New **TEMPCO-VAN** service is now one more reason why perishable shippers will find even greater satisfaction as well as better performance by specifying Pacific Fruit Express service — either rail cars or refrigerated trailers.

OTHER PFE EQUIPMENT, FACILITIES AND SERVICES

- Total refrigerator car ownership 25,300
- Total mechanical cars owned 2,730
- Total Ice-Tempco cars owned 1,000
- Offices and Agencies in all principal Western producing areas; as well as in all major receiving and consuming areas.
- Car shops, ice plants and icing facilities at strategic locations across the country.
- Complete diversion and passing advice service.
- Specialized personnel to serve the perishable shipping and receiving trade.



PFE — the nation's largest operator of refrigerated rail cars.

For the finest in perishable transportation service throughout America, call

PACIFIC FRUIT EXPRESS

SOUTHERN PACIFIC • UNION PACIFIC

All three have offices in principal cities to supply your needs fast —wherever you are.

PACIFIC FRUIT EXPRESS COMPANY

The Pacific Fruit Express Company is one of the oldest refrigerator car companies in the business, having been organized in 1907 when it started with three employes. Contrasted with this it now has some 4,000 employes. However, transportation of perishable foodstuffs and other commodities which require protection against heat and cold were handled by railroads even as far back as 100 years ago. We have information about a carload of butter which moved in a "primitive" refrigerator car for several hundred miles from upper New York State to Boston, Massachusetts in July 1851.

Gradually through the years refrigerator cars, using water ice as a refrigerant, were improved by better construction, including addition of insulation and other devices and then about ten years ago mechanical refrigerating units were developed for use and several thousand cars equipped with such units are already in service.

The refrigerator cars shown in the attached photographs are of the most modern type. Car PFE 10351 is a "standard" car—we refer to it as such because it is by far the most numerous and uses ice and salt to produce refrigeration—is equipped with 4" of insulation in sides and ends and 4½" in the roof and floor. PFE 301213, is a 50-ft. mechanical car, has 7" of insulation in the floor, 7" in the walls and 10" in the roof, and is equipped with adjustable load dividers. These compare with the car of 50 years ago which used 1" or less of insulation. Of course, many

other improvements have been developed to give the cars longer life and much greater efficiency in accomplishing the purposes to which they are devoted.

We mention that the "PFE", as it is familiarly called in railroad and shipping circles, was organized in 1907; it was formally organized in that year, but when plans were laid for the Company in 1906, 6600 refrigerator cars were acquired and they constituted the Company's fleet at that time. We now have over 22,500 cars which is the largest single ownership in the country and constitutes about 30% of the nation's fleet of refrigerator cars.

So much experience has been obtained not only by actual service conditions but by intensive research which has been carried on through the years that it is now possible safely to handle all kinds of perishable foodstuffs and other commodities from and to every part of the country. About 1,000,000 carloads of such commodities move in the United States in the course of a year, and this Company originates and otherwise handles around 285,000 carloads or approximately 28% of the nation's total, the balance being handled by a considerable number of other private car owners, including the Santa Fe Refrigerator Dispatch owned, of course, by the Santa Fe Railway, the Merchants Dispatch owned by the New York Central, Fruit Growers Express owned principally by the Pennsylvania Railroad but also by a number of others, and the American Refrigerator Transit owned by the Missouri Pacific and Wabash

Railroads. These are the largest of the carline companies besides the PFE. The PFE is owned jointly by the Southern Pacific Company and the Union Pacific Railroad Company with which it has contracts for furnishing of refrigerator cars for perishable loading, and in addition has contracts with the Western Pacific Railroad Company and certain Mexican railways under which cars are provided for perishable loading on those lines.

Of course, the providing of cars is naturally one of the essentials of our Company but in another way it is equally essential that various facilities and services be provided to fill out the entire picture. For instance, we have to maintain and operate car shops at which cars are built and repaired. The PFE owns five of these located at strategic parts of the country along the lines of the Southern Pacific and Union Pacific Railroads. Supplementing these shops are light repair and cleaning stations at a number of places throughout the Western part of the United States.

The Company also operates eleven ice manufacturing plants located at various places along the lines of its Owning Railroads and here it manufactures a very considerable tonnage of ice each year; this together with ice purchased from commercial concerns amounts to close to 1,300,000 tons annually, and all of this is issued to the ice compartments in the ice bunker cars as they travel toward their destinations with their precious ladings of fruit, vegetables and

other foodstuffs and miscellaneous perishable commodities.

You will note on some of the attached pictures what appear to be trap doors on the tops of cars which are in elevated position. These are cover openings in the car roof through which ice in broken-up form is placed in what are called bunkers or ice tanks. The tanks take up several feet in either end of the car and something more than 10,000 pounds of ice are distributed to the two tanks in each car when they move under refrigeration service. After the cars are iced these "trap doors", which are more correctly referred to in the industry as a combination of plug and hatch cover, are lowered into the opening through which the ice has been placed in the car and thus you have actually a mobile ice box. When ice is not required for the preservation of the lading the hatch cover plug assembly can be elevated as shown in the pictures and when moved in this way air enters in one end and goes out the other accomplishing ventilation service for certain commodities. Then again during cold weather instead of requiring refrigeration some shipments require heat, and a special type of heater, thermostatically controlled, is used for this purpose; it is lowered into the ice tank compartment of the car securely affixed in place and thus performs its function.

In accomplishing the icing of cars as well as the placing of heaters in the bunkers the Company maintains at all of its ice plants and also at many other

points where servicing is accomplished, platforms which while varying to some extent in structure yet are elevated in such way that the deck is level with the tops of the cars. Ice is raised to these decks and moved by conveyor chains and from there issued by icemen into the tanks of the cars. A more recent development is mechanical icing machines which perform the work of icing cars in a much faster time and more efficiently than by hand.

Ice alone can cool commodities placed in the cars to average of 40° F., but with the addition of salt mixed with the ice the temperatures may be lowered depending upon the amount of salt used; the maximum being 30 per cent. With this rather large quantity of salt placed in and mixed with the ice in the process of servicing the cars in transit, temperatures as low as 10° F. could be obtained and it was with this high percentage of salt with ice that until the last few years the heavy volume of frozen foods shipped throughout the country was moved. However, while this method of transporting frozen foods proved satisfactory in producing the low temperatures indicated, demand developed for the equipping of cars for this kind of traffic with mechanical refrigerating units to provide zero temperatures. The PFE now has some 2700 of the heavily insulated cars with mechanical refrigerating units driven by diesel engines housed in one end of the car. These cars are equipped with thermostats which may be set for controlling temperatures during transit anywhere in the range from below zero to 70°.

In the years 1960 and 1961 PFE equipped 1,000 of its ice bunkers cars with units for constant operation of air-circulating fans while under load to produce controlled temperatures. These modified cars, called "Ice-Tempco" cars, have one end bunker removed and the remaining bunker has been enlarged to hold in excess of 7,000 lbs. of ice. The resulting increase in cubical loading capacity of these cars is about 10%. That means many commodities can be loaded heavier in the car and the constantly operating fans produce better refrigeration under thermostatically controlled temperatures. A 5 HP diesel engine is installed under the car, and an alternator or generator keeps the fans in operation at all times. The thermostat controls the operation of the fans and dampers or louvers which open and close as needed control the circulation of air throughout the car.

The thermostat control range of the Ice-Tempco cars is from 30 to 70 degrees with control settings provided in five degree increments. A "Heater Service" switch is provided in the thermostat control box, which when thrown to the "Heater Service" position, will reverse action of thermostat and provide heater service. When the commodity temperature falls below the desired set point, the fans which then become "heater fans" start and dampers open, by thermostat action, and bring the commodity up to desired set point. Actual heat is generated by an alcohol heater installed in the ice bunker.

PFE 20043 shown in attached photographs is an "Ice-Tempco" car.

Additionally, in June, 1961, PFE acquired several million dollars worth of refrigerator trailers for use in the piggyback rail field.

PFE's piggyback fleet consists of 425 forty-foot refrigerator trailers and 200 flat cars. The trailers are designated as "Tempco-Vans" and like PFE's mechanical refrigerator cars they give thermostatically controlled refrigeration and heater service. They are used for frozen foods as well as fresh fruits and vegetables and add to the many other features of PFE service the convenience of pickup and delivery. Tempco-Vans can be moved by tractor to locations most convenient for shippers for loading and when they have received their cargoes, they are rushed to rail centers where they are placed on railway flat cars, two trailers to the car. At their rail destination, they are again taken by tractor to the point of delivery.

Two piggyback trailers (Nos. 120004 and 120002) are shown in attached photograph loaded on flat car PFE 513145.

Naturally in the operation and administration of so large an enterprise a considerable number of specialists are required.

The construction and maintenance of our very large fleet of refrigerator cars requires an engineering staff and specialists both at headquarters and at the shops.

Similarly our refrigeration functions involve many scientific operations and we are staffed to handle this end of our business in the most efficient manner. We have other engineers assigned to handling all phases of the design, construction and maintenance of our car shop, store and ice plant buildings, structures and related facilities, also research and development activities. We have the necessary Accounting, Purchasing and Executive Departments, and last but not least, the operations of the Company that are referred to as Car Service operations. These latter operations consist in large part of car distribution, the furnishing of commodity protective services as ordered by the shipper, and what is referred to in railroad terminology as diversion and passing service.

As you might well imagine, car distribution is an operation that involves the provision of cars at proper places at the proper times and in condition that will permit the safe transport of products to points of use. This must be accomplished within the limits of reasonable economic necessities, which is to say that the cars must receive full employment without delays.

We have car distribution personnel mainly at San Francisco, Omaha and Chicago, but also in smaller numbers at many other points in the country, all of whom are linked together by telephone and telegraph. They gather information about crop conditions and future need of cars in various loading territories so that they can arrange with the various railroads to

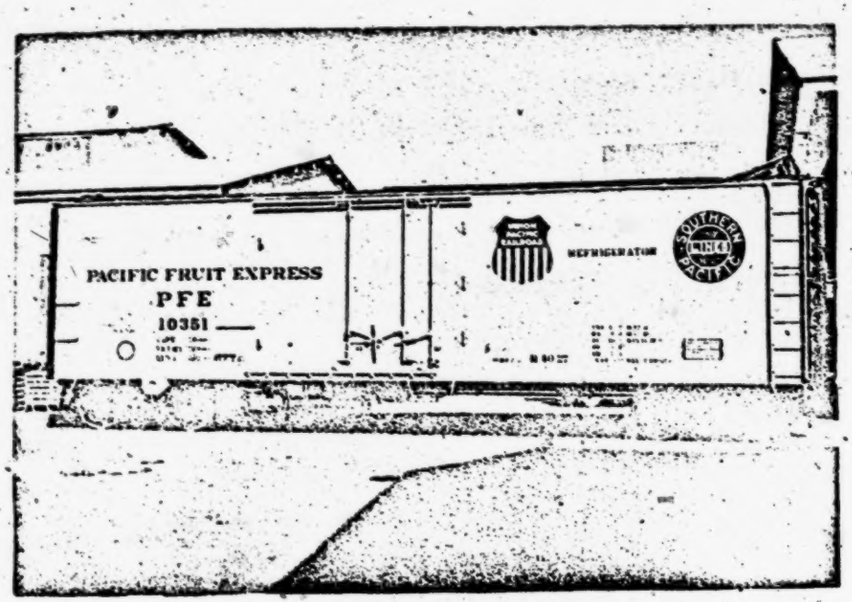
move available cars to such loading territories at exactly the right times. It is an intricate operation and one which requires constant attention and exercise of good judgment to keep the operation in balance.

Shippers of various perishable commodities must, of course, regulate their operations to meet the market demands of various consuming areas. They have to anticipate what future conditions will be and plant and harvest their produce accordingly. Nearly every carload of perishable commodities that moves is subject to the vagaries of market conditions and if after valuable produce is loaded into a car and it is started on its way to the consuming center, say an eastern market, it is learned that another area has better demand and offers a better price, the shipper will call us on the telephone and request that we "divert" the car from its originally billed destination to the new destination. That is the basic meaning of the word "diversion." In handling some 285,000 carloads of perishables a year we are called upon by shippers to accomplish in the neighborhood of 170,000 diversions a year. This involves a vast amount of clerical work and telegraphing and telephoning. We have sizable diversion forces at Chicago, which as you know is a major railroad center, as well as at a great many other points. These same forces through an intricate system of telegraphic reportings are aware at all times where each and every loaded car may be and we keep shippers informed when their shipments "pass" cer-

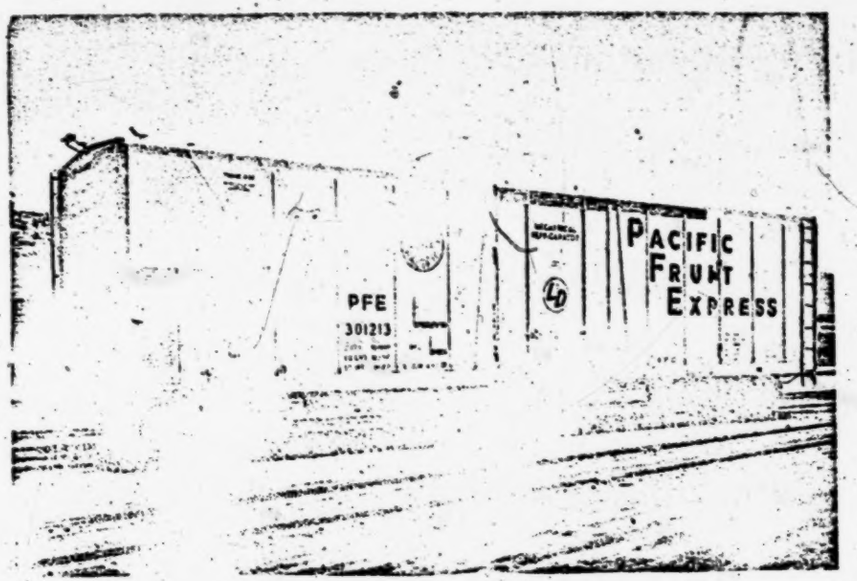
tain points, and this is what we mean when we speak of "passing service."

(See next attached for photographs mentioned herein)

Office of Vice President & General Manager
San Francisco, California
March 1, 1963

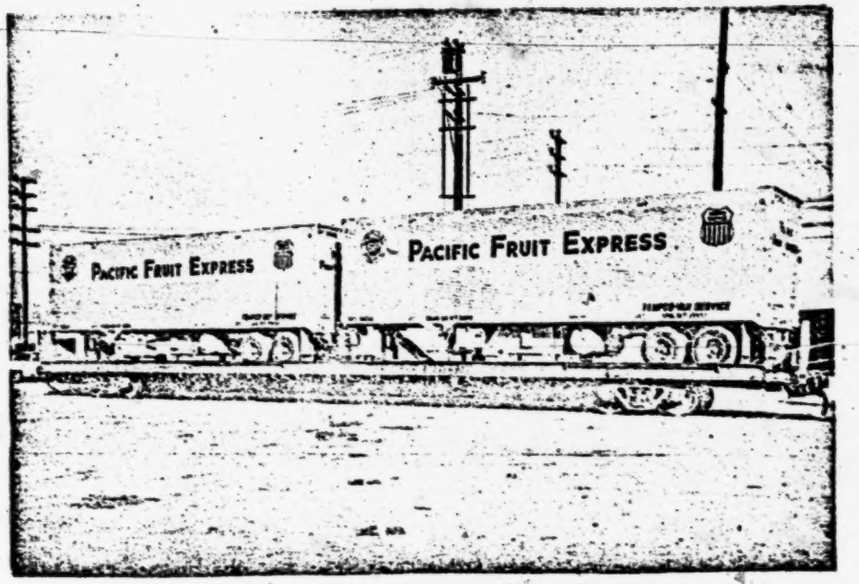


PFE Car No. 10351
Standard Refrigerator Car
Built in February 1957



PFE Car No: 301213
50-ft. Mechanical Car

Ice-Tempco Car



Piggyback trailers on flat car

United States District Court
Northern District of California
Southern Division

No. 44,413

ELISHA EDWARDS,
Plaintiff,
vs.
PACIFIC FRUIT EXPRESS COMPANY,
a Utah Corporation,
Defendant.

SUMMARY JUDGMENT FOR DEFENDANT

This case coming on to be heard before the Honorable Albert C. Wollenberg upon motion of defendant Pacific Fruit Express Company for summary judgment, the plaintiff, Elisha Edwards, being represented by Messrs. Werchick, Kiriakis & Sullivan, by Arne Werchick, Esq., and defendant, Pacific Fruit Express Company, being represented by Messrs. Corrigan & Roy, by Donald O. Roy, Esq., and the Court being fully advised, it is found that the defendant Pacific Fruit Express Company was not at the time of plaintiff's injury a common carrier by railroad subject to the Federal Employers' Liability Act, 45 U.S.C. Section 51 et seq. It is therefore found that the complaint fails to state a claim against de-

fendant Pacific Fruit Express Company, upon which relief can be granted.

It Is Therefore Ordered And Adjudged that defendant Pacific Fruit Express Company is hereby granted judgment against plaintiff.

Dated: MAR 18 1966

Albert C. Wollenberg
Judge of the United States
District Court

United States Court of Appeals
for the Ninth Circuit

No. 21,020

ELISHA EDWARDS,
Appellant,

vs.

PACIFIC FRUIT EXPRESS COMPANY,
Appellee.

[May 10, 1967]

On Appeal from the United States District Court
for the Northern District of California

Before: CHAMBERS, HAMLEY and MERRILL, Circuit Judges.

Per Curiam:

This is an appeal from a district court determination that Pacific Fruit Express Company (P.F.E.) is not a "common carrier by railroad." Appellant, an injured P.F.E. employee, claims that P.F.E. is such a common carrier. At stake is appellant's attempt to proceed under the Federal Employee's Liability Act, 45 U.S.C. 51, et seq.

P.F.E. is a large refrigerator car company. It owns approximately 25,000 refrigerator cars and car-

ries about 28% of all refrigerated goods moving by rail. P.F.E. deals directly with the shipper and, among other activities, maintains a service by which it keeps the shipper posted as to the whereabouts of its goods in transit, thus allowing the shipper to order goods diverted from one destination to another.

In asking this court to decide that P.F.E. is a "common carrier by railroad," appellant necessarily asks that we overrule the case of *Gaulden v. Southern Pac. Co.*, 78 F. Supp. 651 (N.D. Calif.), aff'd 174 F.2d 1022, which construed the term narrowly to exclude refrigerator car companies.* Were the slate clean, we might well be convinced by appellant's argument for a broader definition, but, as it is not, we choose to follow the unanimous line of authority and affirm. We note that since *Gaulden, supra,* was decided in 1949, Congress has not acted to bring refrigerator car company employees under F.E.L.A. protection.

Gaulden, supra, has been followed in *Hetman v. Fruit Growers Express Co.*, 3 Cir., 346 F.2d 947; *Moleton v. Union Pacific Co.*, 118 Ut. 107, 219 P.2d 1080, *cert. denied*, 340 U.S. 932; *Aguirre v. Southern Pac. Co.*, 232 Cal. App. 2d 636, 43 Cal. Rptr. 73.